IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1008 of 1995

For Approval and Signature:

Hon'ble MR.JUSTICE K.R.VYAS
and
Hon'ble MR.JUSTICE R.P.DHOLAKIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

MADANLAL MULCHANDJI KHATIKA & ANR.

Versus

STATE OF GUJARAT

Appearance:

MS. Banna Datta on behalf of Mr. Anil S. Dave for appellants.

MR A.J. DESAI APP for Respondent No. 1

CORAM : MR.JUSTICE K.R.VYAS
and
MR.JUSTICE R.P.DHOLAKIA

Date of decision: 22/03/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE R.P.DHOLAKIA)

1. The judgement and order of conviction and sentence passed by the learned Additional City Sessions Judge, Court No.18, Ahmedabad in Sessions Case No.186 of 1994 dtd. 12th October, 1995 is the subject matter of challenge in this appeal, wherein the appellants were tried for the offences punishable under Section 302 read with Section 34 of Indian Penal Code and under Sec.135(1) of the Bombay Police Act and both were convicted and awarded sentence for life imprisonment and to pay a fine of Rs.500/- in default, one month's Rigorous Imprisonment. The appellants were also punished under Sec.135(1) of the Bombay Police Act and awarded Rigorous Imprisonment for a period of four months. Both the sentences were ordered to undergo concurrently.

2. Short facts of the case may in brief be stated. That on 4/3/1994, Manaji was working in the Tea Stall belonging to her sister Ladhuben, situated at Thakkar-nagar High Way Road, near Dhanji Timber Mart, Ahmedabad and on the day of incident at about 7.00 p.m., when he was washing the vessels, the deceased Ghisaji Ladhuji, who was working as a labourer in the transport godown of one Dataji came and set on the "Charpai". At that point of time, he told Manaji that they will take meal after the arrival of Ramswarup. At about 8.45 p.m. two persons came on bicycles with iron rod and immediately gave iron blows on the head and body of Ghisaji as a result of which, Ghisaji received serious injuries on his head and other parts of his body. Manji requested the assailants not to do so. Therafter, they left the scene of offence on the bicycles along with iron rod. Manaji immediately went to the house of his sister Ladhuben and informed about the incident and thereafter to Soniben and Soniben informed Dakhaben, who happens to be the wife of the employer of Ghisaji, and thereafter, Dakhaben went to her transport godown situated very near to the Tea Stall of Ladhuben where she saw Ghisaji lying on a Charpai in injured condition and was not alive. Therefore, Dakhaben went to Naroda Police Station and lodged the complaint which is recorded by P.S.O. on 5/3/1994 at about 1.30 a.m., and same is registered as C.R. No.I-68 of 1996 for the offences punishable under Sec.302 and 114 of Indian Penal Code and also under Sec.135 of the Bombay Police Act and investigation was handed over to P.S.I., Shri Dave, who immediately went to the scene of offence and prepared inquest Panchnama and sent the dead body for post-mortem into the Civil Hospital. Meanwhile, P.I., Shri H.K. Sharma received telephonic information regarding the incident and he came

there and took the investigation. Shri Dave and started further investigation in the matter. He prepared Panchnama of the scene of offence, and seized muddamal as suggested by FSL expert and called expert from the FSL and called Dog Squad. The Dog went to one house of Mr. Maghanlal Mulchand Khatik from where a shirt has been seized after following necessary procedure. Thereafter, the investigating officer recorded statement of various witnesses including Dog Handler, Manjilaben Madanlal, Ladhuben and Manaji Somaji etc. and also arrested the accused i.e. the present appellants on 6/3/1994 at about 17.00 a.m. and produced them before the competent court and obtained remand upto 9/3/1994. In the meanwhile, on 8/3/1994, the police has held Identification Parade of the accused in the office of the Executive Magistrate at Ahmedabad and after collecting the report of the FSL, the investigating officer has submitted chargesheet against both the accused - appellants in the Court of Metropolitian Magistrate under Sectinons 302, 34 of IPC and Sec.135(1) of B.P. Act, who in turn committed the case to the Sessions Court and where the said case is registered as Sessions Case No.186 of 1994.

Thereafter charge has been framed against both the accused and as they have pleaded not to guilty and prayed for trial. Thereafter, the matter was assigned to the then learned Additional Sessions Judge, Court NO.18, Ahmedabad. To prove the guilt against the accused, the prosecution has examined in all 19 witnesses and produced documentary evidence in support of their case. After recording further statement of the accused u/s. 313 of the Criminal Procedure Code, and after hearing the learned advocates for the respective parties, the learned Sessions Judge has convicted both the accused and awarded sentence as stated above, against the said judgement and order, the present appeal is preferred by the appellants original accused.

3. We have heard the learned counsel Ms. Banna Datta on behalf of the appellants and learned A.P.P. Mr. A.J. Desai for State.

4. Ms. Banna Datta, mainly argued that the case of the prosecution is solely based on the evidence of eye witness i.e. Manaji P.W.No.6. Taking us through the oral evidence of Manaji, she has argued that as such Manaji is not an eye-witness as he was not present at the time of incident and he is a got up one. Learned advocate for the appellants has further argued that in absence of evidence of P.W.No.6, there are no evidence worth the name to connect the accused with the crime.

She has contedded that the alleged identification parade, which has been held in the office of Executive Magistrate at Ahmedabad, was not properly held. She has further contended that before the identification parade was held, Manaji had opportunity to see the accused twice; firstly, early in the morning when the accused were with the police and secondly, when the identification parade was held and hence, the identification parade is not trustworthy. According to her, though there are no evidence worth the name to connect the accused with the crime, the learned Sessions Judge has convicted the accused. The learned advocate for the appellants has drawn our attention towards various panchnamas including the recovery panchnama of the alleged weapon and argued that all the Panchas have not supported the say of the prosecution and that even the complainant has also not supported the say of the prosecution so far as the blood stain marks and blood group is concerned, she has argued that the prosecution has not proved the blood group of the witness Manaji and that of accused and, therefore, it is very risky to rely upon the above evidence alone. In short, the learned advocate for the appellants has argued that the prosecution has failed to prove the case against the appellants beyond reasonable doubt and therefore, the appellants are required to be acquitted.

5. On the other hand, learned A.P.P. Mr. A.J. Desai appearing for the State has argued that there is no reason to disbelieve the evidence of star witness Manaji P.W. No.6. Relying on his evidence, Mr. Desai has argued that Manaji has identified the accused appellants as assistant and has also identified them during the identification parade. The prosecution gets support from other evidence namely, Panchnama of recovery of clothes of the accused. In view of the above facts, the prosecution has proved the case against the accused beyond all reasonable doubt and the Court below has rightly held the accused - appellants guilty and therefore, it is not a fit case wherein interference of this Court is warranted.

6. We have also gone through the record and proceedings of the trial court including the documentary and oral evidence. The prosecution has mainly relied on the evidence of P.W.No.6. We have carefully scrutinised the said evidence. He has deposed that at the time of commission of the offence, he was present at the Tea Stall of his sister Ladhuben from 6.00 p.m. onwards; and at and at 7.30 p.m. deceased Ghisaji came there and sat on the Charpai and told Manaji that as soon as Ramswarup comes, we will take dinner. At that time at about 8.30

p.m. to 9.00 p.m., two persons came there with iron rod and gave iron blows on the head and various parts of body of Ghisaji, as a result of which Ghisaji received serious injuries on his head and on other parts of his body. He immediately went to the house of his sister and informed one Soniben regarding the incident and thereafter he along with the Soniben and his sister Ladhuben went to the scene of offence. Whereas, in his cross-examination, he has categorically admitted that he has not given the name of the accused before the police while recording his statement. He has also admitted in his cross-examination that he had an opportunity to identify the accused and also to see the accused Madanlal early in the morning when the police has identified him as Madanlal. He has also admitted that the accused No.2 is the Brother-in-law of accused No.1. He was knowing Madanlal since long because Madanlal used to come to the Timber Mart situated very near to the Tea Stall of Ladhuben. In short, he has categorically admitted that he was knowing both the accused appellants since long, even the accused No.2 by name. He has also admitted that accused No.2 was working with the deceased Ghisaji and that he has not given the name of the accused when the police recorded his statement, which creates doubt in the mind of this Court because if at all Manaji was present at the time of incident, then, he could have given the name of the assailants at the time of recording his statement. Instead of doing so, he has only given the description of the assailants. Over and above, according to him, he has immediately informed Ladhuben and Soniben regarding the incident but not given the name of the accused, but only description was given and therefore, even Ladhuben while lodging the complaint, has not given the name of the assailants but only description was given, which indicates that when P.W.NO.6 was knowing both the accused since long, if at all he was present at the time of incident, he must have given the name of the assailant accused to all the concerned at the earliest, but he has not given the same which leads to the only conclusion that at the time of commission of the offence, Manaji P.W. No.6 was not present there. Over and above, it has also been established that the police has shown Madanlal to P.W. No.6 - Manaji early in the morning when he was in the custody of the police. Over and above, even on 7/3/1994, at the time of identification parade, the Manaji - P.W. No.6 was knowing about the accused by name and he had had opportunity to see the accused prior to the indentification. Therefore, the identification parade was nothing but one more exercise which was not required to be done by the investigating officer. Even the witness Manaji P.W. No.6 could have told the

investigating officer that he knows the accused since long and they were assailants, and therefore, the identification parade was not required. At the most, the police could have recorded the further statement of Manaji - P.W. No.6 on that basis, but the prosecution has tried to establish Manaji - P.W. No.6 as a star witness, though he was not present at the time of commission of the offence, but might have reached there afterwards and he immediately informed Ladhuben, Soniben etc., and therefore, the police has started investigation on that basis. For the purpose of getting the clue, the police has called Dog Squard and thereafter the police reached upto certain aspect of the matter and thereafter recorded the further statement of the Manaji early in the morning, whereas as per the admission of Manaji - P.W. No.6,. he never went to the scene of offence after the incident which creates doubt in the mind of this court. When Manaji P.W.No.6 himself has admitted that he had opportunity to see the accused prior to identification parade, it is very risky to rely upon the alleged identification parade and convict the accused only on that basis, more particularly when he has categorically admitted in his cross-examination on page 5 that during the identification, the police constable has identified the accused and took out the assailant from the line of the accused, and thereafter, the P.W. No.6 has identified them as assailants in his presence, which goes to the root of the identification parade. Therefore, we have no hesitation in holding that the identification parade is not trustworthy and believable or it has not been held properly. The Executive Magistrate could have taken reasonable care and caution while dealing with the identification parade. But in the present case, the Executive Magistrate failed to exercise his duty independently. Even P.W. No.6 has also identified the muddamal article Nos. 16 and 17 with detailed description that muddamal article NO.16 was in the hands of the accused-appellant No.1 and the muddamal article NO.17 was in the hands of the accused-appellant NO.2 at the time of commission of the offence. The said muddamal article Nos. 16 and 17, are nothing but iron rods and it is impossible to identify that iron rod muddamal article No.16 was in the hands of accused No.1 and muddamal article no.17 was in the hands of accused No.2, at the time of commission of the offence at 8.30 p.m. in dark place, which shows that P.W. No.6 has deposed in such a manner so as to involve the accused in the crime. On the other hand, P.W. No.6 has admitted in his cross-examination that at the time of commission of offence, there was dark and one can not identify a person if he is at a distance of about 10 ft. Even P.W.No.20

Mr. Sharma and P.W.NO.40 - P.S.I. Mr. Dave who performed the inquest Panchnama and recorded the F.I.R., have also admitted in their evidence that at the time of commission of the incident, there was dark and there was no light even near to the scene of offence, and admittedly, the incident has taken place in between 8.30 p.m. and 9.00 p.m. whcih is contrary to the case of the prosecution that Manaji - P.W.No.6 was present at the time of commission of offence and he has seen the incident. Thus, the evidence of P.W. No.6 is not trustworthy and he is not a witness of truth.

7. As far as the blood stain marks on the paints of Manaji - P.W.No.6 is concerned, in view of the above discussion regarding the presence of the Manaji, no prudent man can come to the conclusion that Manaji P.W. No.6 was present at the time of incident. It might be the result of something else that after the incident he has reached the scene of offence and tried to save the deceased and while doing so, he came in contact with body of the deceased and hence the blood stain marks was found on his paints. Merely there was blood stain marks on the paints of Manji P.W. No.6 does not mean that he was present at the relevant time. Moreover, the blood group of the Manaji is also not proved by the prosecution.

8. Except the oral evidence of Manaji - P.W.No.6, identification parade and evidence of the Executive Magistrate, there is no other material evidence on record to hold that the prosecution has proved the case against the accused appellants beyond reasonable doubt. The evidence of P.W. No.6, on which the prosecution has placed much reliance and relying on which, the trial court has convicted the appellants, is also not trustworthy and believeable as he is not a witness of truth, and in absence of proper identification parade and the evidence of the Executive Magistrate, there is no other material evidence on the record which involves the accused appellants in the crime. The prosecution failed to prove the case against the accused appellants beyond all reasonable doubts.

9. In the result, the appeal is allowed. The judgement and order passed by the learned Additional City Sessions, Judge, Court No.18, Ahmedabad dtd. 12/10/1995 in Sessions Case No.186 of 1994, is hereby quashed and set aside. The appellants original accused namely [1] Madanlal Mulchandji Khatika and [2] Ramswarup Bherulalji Khatika, are ordered to be released forthwith, if they are not required in any other case.

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Rafik